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Looking Again at Tribal Jurisdiction: "Unwarranted Intrusions on Their Personal Liberty"

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LOOKING AGAIN AT TRIBAL JURISDICTION: "UNWARRANTED INTRUSIONS ON THEIR PERSONAL LIBERTY"[1]

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I. INTRODUCTION

Abstract jurisdictional policies have created an uneasy reality in Indian country.[2] After a fourteen-year-old child was killed by a shotgun blast within the Salt River Pima-Maricopa Indian Community, the United States Supreme Court, in *Duro v. Reina*,[3] held that a tribal court no longer had the jurisdiction to try and punish an accused when the accused belonged to another tribe. Earlier, *Oliphant v. Suquamish Indian Tribe*[4] eliminated tribal criminal jurisdiction over non-Indians committing crimes in Indian communities.

As a result of the these decisions, tribes could assert criminal jurisdiction only over Indians who were members of the prosecuting tribe. In divesting tribes of jurisdiction over all others, *Duro* and *Oliphant* reasoned that tribal jurisdiction was an unwarranted intrusion on personal liberty.[5] *Duro* and *Oliphant* also perpetuated the ideological movement toward implicit divestment of tribal sovereignty. This practice can unpredictably redefine tribal sovereign powers because without implicit divestment, tribal

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1. Duro v. Reina, 495 U.S. 676, 692 (1990) (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978)).

2. Indian country is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1988).

3. 495 U.S. 676 (1990).

4. 435 U.S. 191 (1978).

5. *Duro*, 495 U.S. at 692; *Oliphant*, 435 U.S. at 210.

powers can be understood as retained until expressly divested by Congress through treaty or statute.[6]

The ideological ramifications of the *Oliphant* and *Duro* decisions created immediate and practical law enforcement concerns. While non-Indians could be prosecuted by states for committing crimes in Indian communities, Indians who were not members of the prosecuting tribe could not be prosecuted by any court under *Duro* because neither the federal government nor most states assumed jurisdiction over certain offenses in Indian country.[7] Consequently, law enforcement was achieved by means of cross-deputization agreements.[8]

Recently, however, Congress effectively overturned *Duro* by reaffirming the "inherent" power of tribes to exercise jurisdiction over all Indians,[9] both members and nonmembers. Although tribes still cannot prosecute non-Indians who commit crimes in Indian country, the legislation has cast doubt on *Oliphant*.[10] One practical reason for this doubt is that both non-Indians and nonmember Indians can enter many Indian communities.[11] Because tribes cannot try non-Indians under *Oliphant*, tribal police and court efforts to maintain law and order remain extraordinarily complex because enforcement is contingent on the identity of the perpetrator. More important, because both *Duro* and *Oliphant* relied on similar reasoning, Congress's recent abolition of *Duro*'s jurisdictional distinction between

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6. "Sovereign authority is presumed until Congress affirmatively acts to take such authority away.... '[W]hen a question of tribal power arises, the relevant inquiry is whether any limitation exists to *prevent* the tribe from acting, not whether any authority exists to *permit* the tribe to act.' " Native Village of Venetie IRA Council v. Alaska, 944 F.2d 548, 556 (9th Cir. 1991) (quoting WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 71-72 (2d ed. 1988)); *see also* United States v. Wheeler, 435 U.S. 313, 323 (1978).

7. The Supreme Court, however, did not accept the theory of a jurisdictional void. *Duro*, 495 U.S. at 697.

8. *See* Katie Hickox, *Crimes Committed on Reservations*, States News Service, Oct. 18, 1991, *available* in LEXIS, Nexis Library, SNS File ("In New Mexico, some pueblos have set up temporary alliances with county and state courts to fill the jurisdictional void.").

9. Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646, amended the Indian Civil Rights Act, 25 U.S.C. 1301 (1988), by further defining the "powers of self-government" to mean: "[T]he inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."

10. A recent congressional debate highlights such doubt:

Mr. Kyl: "Is the legislation a precursor to overturning the Oliphant decision in which the Supreme Court precluded tribal court jurisdiction over non-Indians?"

Mr. Miller of California: "This legislation is in no way meant to change the criminal misdemeanor jurisdiction of tribes over non-Indians." 137 CONG. REC. H2988, 2989 (daily ed. May 14, 1991).

11. *Duro*, 495 U.S. at 695; Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 466 (1976) (The Confederated Salish and Kootenai Tribes' reservation population is only 19% of the total reservation population.).

member and nonmember Indians in criminal cases may call attention to problems associated with the "implicit divestment" and "personal liberty" theories used in *Oliphant*, followed in *Duro*, and replicated in other cases.

This Article discusses the underlying theories of *Duro* and *Oliphant*, including notions of "internal self-governance" and "citizenship." As a preface to this discussion, the present federal criminal jurisdiction scheme and its origins will be introduced in order to provide the context for the lingering dispute advanced by *Duro* and *Oliphant*.

II. FEDERAL CRIMINAL STATUTES AND CASES APPLICABLE TO INDIAN COUNTRY

By 1790, "Trade and Intercourse" acts were regulating crime and trade with Indians. The early acts placed the federal government in the position of moderating criminal disputes arising between United States citizens and noncitizen Indians.[12] For example, the March 30, 1802 Trade and Intercourse Act called for the punishment of non-Indian citizens who committed crimes against Indians in Indian lands. Indians who committed crimes against non-Indian citizens in a state or territory were punished after a United States official made "application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction."[13] Geographic separation between many tribes and non-Indians, however, meant that little crime should have been governed by the federal acts.[14]

In the early 1800s, Chief Justice Marshall examined the relationship between Indian tribes and the federal government. In *Johnson v. M'Intosh*,[15] Marshall evaluated the strength of land titles originating in Indian tribes, Europe, and the colonies under the discovery doctrine:

> [D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

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12. E.g., Act of July 22, 1790, ch. 33, 1 Stat. 137 (expired in 1793), federally directed states to moderate crimes by citizens or U.S. inhabitants against Indians. Policy dictated that "provision should be made for inflicting adequate penalties upon all those who, by violating [Indian] rights, shall infringe the treaties and endanger the peace of the Union." President Washington's Third Annual Message, (Oct. 25, 1791), *in* DOCUMENTS OF UNITED STATES INDIAN POLICY 15, 16 (Francis P. Prucha ed., 2d ed. 1990).

13. Trade and Intercourse Act, ch. 13, 2 Stat. 139 (1802) (repealed in 1834).

14. Separation between tribes and non-Indians was supported by law. Non-Indian settlers on Indian land were fined up to $1000 and imprisoned for up to one year. Non-Indian citizens often needed passports to travel in Indian land. Trade and Intercourse Act, ch. 13, 2 Stat. 141 (1802) (repealed in 1834).

15. 21 U.S. (8 Wheat.) 543 (1823).

> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives. . . .[16]

Under the discovery theory, the United States acquired English rights,[17] and lands "unknown to all Christian people"[18] could be discovered by Christian nations. "Heathens" would maintain the occupancy title, while Europeans would take the discovery title to grant lands.[19]

Marshall elaborated on the federal and Indian tribe relations in *Cherokee Nation v. Georgia*.[20] The Cherokee Nation sought to enjoin the State of Georgia from regulating within Cherokee lands. The Court held that the tribe erred in petitioning the Court as a foreign nation[21] because the Court considered tribes "domestic dependent nations."[22]

Marshall clarified the Court's vision of the federal/tribal power structure in *Worcester v. Georgia*,[23] holding that the states could not interfere with the relations between the Indian tribes and the federal government.[24] Discovery, as applied in *Worcester*, was largely the exclusive right of one European nation to purchase lands from the tribes.[25]

Worcester defined tribal power as independence—constrained by federal trade management, treaty, and discovery doctrine restrictions on a tribe's land sales or foreign relations.[26] Discovery constraints bound European nations more than tribes.[27] Tribes retained "their title to self-government."[28]

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16. *Id.* at 573.

17. *Id.* at 584, 588.

18. *Id.* at 576.

19. *Id.* at 574. *M'Intosh* determined that discovery could possibly give the discoverer an exclusive right to extinguish the Indian title of occupancy. *Id.* at 585-87. The discoverer could extinguish Indian occupancy and acquire Indian land. *Id.* at 588-89. "Conquest gives a title which the courts of the conqueror cannot deny. . . . The conqueror prescribes its limits." *Id.*

20. 30 U.S. (5 Pet.) 1 (1831).

21. *Id.* at 19. The constitutional language of Article I, § 8 gives Congress the power to regulate "commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. CONST. art. I, § 8. According to Marshall, if Indian tribes were in fact foreign nations, the Constitution would not have distinguished the two. *Cherokee Nation*, 30 U.S. (5 Pet.) at 19.

22. *Id.* at 17. According to Marshall, Indians have an "unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; . . . They may . . . be denominated domestic dependent nations. . . . [T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." *Id.*

23. 31 U.S. (6 Pet.) 515 (1832).

24. *Id.* at 561-62.

25. *Id.* at 544, 559.

26. *Id.* at 557-61.

27. *Id.* at 544, 559. "To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves." *Id.* at 543.

28. *Id.* at 560.

Although Marshall believed that tribes had governments, "Courts of Indian Offenses" were established in 1883 on the premise that reservations were lawless.[29]

The Act of March 3, 1817,[30] the forerunner of 18 U.S.C. § 1152,[31] extended federal laws into Indian country[32] but did not apply to offenses committed by one Indian against another Indian.[33] Crimes between non-Indians in Indian country had been included within federal jurisdiction, but eventually courts determined that federal jurisdiction over non-Indians would be transferred to the states.[34]

In *Ex parte Crow Dog*,[35] the Supreme Court confirmed that federal courts had no jurisdiction over crimes between Indians. Tribes had exclusive jurisdiction over these crimes in Indian country until the Major Crimes Act of 1885.[36] The Act, in effect today, places certain enumerated offenses involving Indians within the jurisdiction of the federal courts.[37] Tribal

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29. The Commissioner of Indian Affairs established tribunals at all Indian agencies "except among the civilized Indians, consisting of three Indians, to be known as the court of Indian offenses," because "[m]any of the agencies are without law of any kind, and the necessity for some rule of government on the reservations grows more and more apparent each day." H.R. EXEC. DOC. NO. 1, 48th Cong., 1st Sess. (1883), *reprinted in* DOCUMENTS OF THE UNITED STATES INDIAN POLICY, *supra* note 12, at 160. The courts still operate in Indian country that lack traditional or tribal courts. *See* Law and Order on Indian Reservations, 25 C.F.R. § 11 (1993).

30. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383.

31. 18 U.S.C. § 1152 (1988). The statute provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Id.

32. Areas under the jurisdiction of the United States include military bases, vessels on the high seas, and Indian country. United States v. Antelope, 430 U.S. 641, 648 n.9 (1977).

33. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383.

34. *Antelope*, 430 U.S. at 648 n.9; United States v. McBratney, 104 U.S. 621 (1881).

35. 109 U.S. 556 (1883).

36. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (1988)).

37. The Major Crimes Act subjects an Indian who commits murder, rape, or any of the other offenses listed in the act "to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153 (1988).

courts may have concurrent jurisdiction over major offenses and exclusive jurisdiction over minor offenses between Indians.[38]

During the half-century preceding the passage of the 1885 Major Crimes Act, many tribes were removed from land east of the Mississippi River to territory west of the river.[39] In accordance with an assimilation policy, Congress replaced removal with the 1887 Indian General Allotment Act.[40] The Act authorized the allotment of land to individual Indians or families.[41] Allotment curtailed a tribe's land ownership authority and disempowered tribal governments.[42] Eventually, the Indian Reorganization Act of 1934 ended allotment and permitted restoration or expansion of tribal land ownership.[43] Indian tribes could reaffirm the "right to organize for [their] common welfare, and . . . adopt an appropriate constitution and bylaws."[44]

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38. United States v. John, 437 U.S. 634, 651 n.21 (1978) ("We do not consider here the more disputed question whether s. 1153 also was intended to pre-empt tribal jurisdiction."); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 n.14 (1978) ("We have no reason to decide today whether jurisdiction under the Major Crimes Act is exclusive."); *see also* United States v. Wheeler, 435 U.S. 313, 325 n.22 (1978).

39. According to President Jackson, it was:

> [A]n established fact that [Indians] can not live in contact with a civilized community and prosper.
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> . . . .
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> The pledge of the United States has been given by Congress that the country destined for the residence of this people shall be forever "secured and guaranteed to them." A country west of Missouri and Arkansas has been assigned to them, into which the white settlements are not to be pushed. No political communities can be formed in that extensive region, except those which are established by the Indians themselves or by the United States for them and with their concurrence.

President Jackson on Indian Removal, December 7, 1835, *in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 12, at 71-72; *see* Act of May 28, 1830, ch. 148, 4 Stat. 411 (1830) (Indian Removal Act).

40. Indian General Allotment Act (Dawes), ch. 119, 24 Stat. 388 (1887) (codified in scattered sections of 25 U.S.C.).

41. Citizenship was provided to qualifying Indians. Indian General Allotment Act, ch. 119, § 6, 24 Stat. 388, 390 (1887) (codified as amended at 25 U.S.C. § 349 (1988)). Like many acts governing tribes, allotment was not uniformly applied to all tribes. At least nine tribes were originally excluded from the Act. § 8, 24 Stat. at 391.

42. Under the Curtis Act, payments from the federal government were no longer made to tribal governments, but directly to individuals. Curtis Act, ch. 517, 30 Stat. 495 (1898). The Act stipulated that the laws of Indian tribes "shall not be enforced at law or in equity by the courts of the United States in the Indian Territory." § 26, 30 Stat. at 504. Tribal courts were abolished. § 28, 30 Stat. at 504-05.

43. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § 476 (1988)).

44. § 16, 48 Stat. at 987. Tribes could vote to reject or approve the application of the Act. § 18, 48 Stat. at 988. Oklahoma tribes were excluded from the Indian Reorganization Act's bene-

All Indians born in the United States became citizens in 1924,[45] and in 1953, Public Law 280 was enacted.[46] In this Act, Congress delegated to a few states the power to adjudicate Indian country criminal offenses.[47] The Indian Civil Rights Act of 1968[48] changed Public Law 280 by requiring tribal consent to state jurisdiction. The Act was passed just before the present era of self-governance began.[49]

III. SUMMARY OF *DURO V. REINA* AND *OLIPHANT V. SUQUAMISH INDIAN TRIBE*: DIVESTMENT OF EXCLUSIVE AND CONCURRENT TRIBAL JURISDICTION

The foregoing acts and cases predominantly dealt with federal jurisdiction. The concurrent or exclusive criminal jurisdiction of tribes was not clearly addressed by courts until *Oliphant v. Suquamish Indian Tribe*[50] and *Duro v. Reina*.[51] The case summaries in this section highlight the similarities between *Duro* and *Oliphant*.

A. Oliphant v. Suquamish Indian Tribe

In *Oliphant*, non-Indians objected to tribal jurisdiction over their charged offenses, which included assaulting a tribal police officer. In delivering the opinion, Justice Rehnquist noted that tribes claiming criminal jurisdiction over non-Indians asserted jurisdiction based on the retained sovereignty of the tribe, not on congressional delegations or treaty provisions.[52]

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fits until the Oklahoma Indian Welfare Act was passed. Oklahoma Indian Welfare Act, ch. 831, §§ 3, 7, 49 Stat. 1967 (1936) (codified as amended at 25 U.S.C. §§ 501-504 (1988)).

45. Act of June 2, 1924, ch. 233, 43 Stat. 253 (repealed 1952).

46. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1988)).

47. Under 18 U.S.C. § 1162 (1988), states have jurisdiction in at least some of the Indian country within the borders of some designated states, including Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.

48. 25 U.S.C. §§ 1301-1303 (1988).

49. See the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638, 88 Stat. 2203, 2203-14 (1975) (codified as amended at 25 U.S.C. § 450 (1988)), where Congress found that "prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government." § 2(a)(1), 88 Stat. at 2203. Congress's Indian self-determination policy encouraged "transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people." § 3(b), 88 Stat. at 2204.

50. 435 U.S. 191 (1978).

51. 495 U.S. 676 (1990).

52. *Oliphant*, 435 U.S. at 196.

Rehnquist divided his evaluation of the retained sovereignty of the tribe into three parts. The first two sections of the decision were largely historical. The last section examined implicit divestment of tribal power.

Rehnquist began his historical discussion by stating that the tribal exercise of jurisdiction over non-Indians was relatively new and that few tribes had maintained formal court systems until the middle of the century.[53] Rehnquist found that treaties generally did not provide for tribal jurisdiction over non-Indians,[54] and that cases discussing the matter were rare and did not support jurisdiction.[55] Rehnquist added that Congress never specifically addressed tribal jurisdiction over non-Indians, with the exception of the Western Territories Bill of 1834.[56] This Bill was never passed but seemed to show Congress's intent to reserve criminal jurisdiction over non-Indians to the federal government.[57] Congress never expressly forbade tribes from imposing criminal penalties on non-Indians,[58] but Rehnquist made explicit the unspoken assumption he felt was held by Congress—that

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53. *Id.* at 196-97.

54. *Id.* at 196-99. The first federal/tribal treaty was made with the Delawares in 1778 and provided that:

> neither party to the treaty could "proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders . . . till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice."

Id. at 199 n.8 (quoting the Treaty with the Delawares, Sept. 17, 1778, U.S.-Delawares, art. IV, 7 Stat. 13, 14). According to *Oliphant*, only that first treaty expressly provided for such jurisdiction. *Id.* Shortly after *Oliphant*, United States v. Wheeler, 435 U.S. 313 (1978), reaffirmed that treaties are considered grants of power from tribes, not grants to tribes. *Id.* at 327 n.24. Since treaties represent grants of power from tribes, failure of tribes to grant exclusive jurisdiction to the federal government meant that tribes retained the jurisdiction.

55. Rehnquist also relied on a withdrawn opinion from the Solicitor of the Interior. *Oliphant*, 435 U.S. at 200-01 & n.11.

56. *Id.* at 201-02.

57. *Id.* According to *Oliphant*, the Western Territories Bill resembled early treaties. The Bill "did not extend the protection of the United States to non-Indians who settled without government business in Indian territory." *Id.* at 202 n.13 (citing H.R. REP. No. 474, 23d Cong., 1st Sess. 18 (1834)). Congress's "unspoken assumption" that tribes were divested of criminal jurisdiction over non-Indians was evident to Rehnquist in other 19th-century congressional actions. For example, Rehnquist reasoned that major crimes jurisdiction over Indians may be exclusively held by the federal government. Accordingly, if tribes had jurisdiction over these crimes, tribes would have more jurisdiction over non-Indians than they had over Indians. *Id.* at 203. Rehnquist's analysis ignores the well-known contention that major crime jurisdiction may be held concurrently by the tribes and the federal government. *See supra* note 38 and accompanying text.

58. *Oliphant*, 435 U.S. at 204.

tribes did not have criminal jurisdiction over non-Indians. Rehnquist believed that the executive branch shared Congress's presumption.[59]

The second part of *Oliphant* was a historical treaty argument. The Suquamish treaty "appear[ed] to be silent as to tribal criminal jurisdiction over non-Indians,"[60] but the historical context of the treaty made tribal jurisdiction over non-Indians doubtful. In the treaty's ninth article, the tribe acknowledged its dependence on the United States. Rehnquist thought that the acknowledgement of dependence and the promise to "be friendly with all citizens" probably meant that the Suquamish recognized exclusive federal criminal jurisdiction over non-Indians.[61]

The third and final part of the decision, which was followed closely by *Duro*, discussed tribal power in terms of implicit divestment. Rehnquist explained that tribal powers are not only expressly divested by act or treaty, but also by implication. Tribes were deemed to have lost those powers inconsistent with their dependent status at the tribes' incorporation into the United States. At incorporation, tribes came into the territorial sovereignty of the United States, and "their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty."[62]

Federal interests overrode tribal interests in protecting their territory. Formation of the Union and adoption of the Bill of Rights indicated that "citizens [should] be protected by the United States from unwarranted intrusions on their personal liberty."[63] Thus, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily [gave] up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[64]

B. Duro v. Reina

Duro v. Reina[65] relied heavily on *Oliphant* to divest tribes of inherent sovereign powers over nonmember Indians in criminal cases. The dispute began after the Salt River Pima-Maricopa Tribe refused to drop the charge

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59. *Id.* at 206. Rehnquist added that a 1960 Senate report concluded that a federal trespass law was necessary for Indian land because non-Indians were not subject to tribal jurisdiction. *Id.* at 204-06 (citing S. REP. NO. 1686, 86th Cong., 2d Sess., 2-3 (1960)).

60. *Id.* at 206 (discussing the Treaty at Point Elliot, Jan. 22, 1855, 12 Stat. 927 (1855)).

61. *Oliphant*, 435 U.S. at 206-07 & n.16.

62. *Id.* at 209.

63. *Id.* at 210.

64. *Id.*

65. 495 U.S. 676 (1990).

of illegal firing of a weapon against Albert Duro, a nonmember Indian.[66] Duro filed a petition for habeas corpus in federal district court challenging tribal jurisdiction over crimes involving an accused nonmember Indian.[67] The Court of Appeals for the Ninth Circuit found tribal jurisdiction.[68] The Supreme Court reversed.

Justice Kennedy, writing for the majority, eliminated congressional delegation or treaty provision as the source of tribal jurisdiction. As in *Oliphant*, the question was whether the tribe's retained sovereignty encompassed such power.[69] Kennedy utilized *Oliphant* and *United States v. Wheeler*[70] and cautioned that *Wheeler* implicitly divested tribes of power in areas involving relations between a tribe and outsiders. External power over outsiders "would have been inconsistent with the Tribe's dependent status, and could only have come to the Tribe by delegation from Congress."[71]

The civil power of tribes over both nonmember Indians and non-Indians is permissible in areas that are vital to the maintenance of tribal integrity and self-determination. Such "civil authority typically involves situations arising from property ownership within the reservation or 'consensual relationships with the tribe or its members.' "[72]

In contrast, Kennedy argued, the exercise of criminal jurisdiction "involves a far more direct intrusion on personal liberties."[73] As a nonmember Indian, Duro was not able to become a member, vote, hold office, or serve on a jury.[74] As a result, Duro's relations with the tribe were regarded as the same as the non-Indian's in *Oliphant*.[75] Accordingly, the "Tribe's powers over him [were] subject to the same limitations."[76]

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66. *Id.* at 681. A federal indictment charging Duro with murder and aiding and abetting murder was dismissed without prejudice. *Id.* at 679-80.

67. Duro is an enrolled member of the Torres Martinez Band of Mission Indians. The victim was an enrolled member of the Gila River Indian Tribe. *Id.* at 679.

68. The Court of Appeals for the Ninth Circuit based tribal jurisdiction on Duro's significant contacts with the prosecuting community and the need for effective law enforcement. *Id.* at 683.

69. *Id.* at 684.

70. 435 U.S. 313 (1978). *Wheeler* held that because the sources of power derive from different sovereigns, successive tribal and federal prosecutions do not place a defendant in double jeopardy. *Id.*

71. *Duro*, 495 U.S. at 686.

72. *Id.* at 688 (quoting Montana v. United States, 450 U.S. 544, 565 (1981)).

73. *Id.*

74. *Id.* (citing *Oliphant*, 435 U.S. at 194).

75. *Id.*

76. *Id.* Kennedy argued that the lack of "formal" Indian court systems resulted in little historical evidence or challenges to tribal jurisdiction over nonmember Indians. Most parties simply agreed to submit to tribal courts. *Id.* at 688-89.

Though the federal government has historically treated Indians as a single large class in many congressional acts, "the history of *federal* provisions does not sustain [a] claim of *tribal* power."[77] The "statutes reflect at most the tendency of past Indian policy to treat Indians as an undifferentiated class."[78] Admitting that the evidence is unclear, Kennedy believed that tribal jurisdiction applied to tribal members only.[79]

Kennedy also sought to protect the rights of everyone who entered Indian country without consenting to tribal governance. Indians, as citizens, must "be protected . . . from unwarranted intrusions on their personal liberty."[80] He added, "Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States."[81] As such, the Court could not submit groups of citizens, such as nonmember Indians, "for trial by political bodies that [did] not include them."[82] However, retained tribal jurisdiction over tribal members was permissible because of "the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent."[83]

Kennedy found that the tribal courts posed a hazard to individual liberty for several reasons. First, tribal courts are influenced by the "unique customs, languages, and usages of the tribes they serve. Tribal courts are often 'subordinate to the political branches of tribal governments,' and their legal methods may depend on 'unspoken practices and norms.' "[84] Additionally, the lack of protection afforded by the Bill of Rights and the different protection of the Indian Civil Rights Act can result in deprivations, including the lack of appointed counsel for indigent people. "Our cases

77. *Id.* at 690.

78. *Id.*

79. The Court cited a Department of Interior opinion indicating that only adoption of nonmembers into the tribe or a receipt of delegated authority would result in tribal jurisdiction over nonmembers. *Id.* at 692 (citing 1 Op. Sol. 849 (Aug. 26, 1938)). Another opinion stated that the only remedy for "interloping nonmember Indians" was removal from the reservation or acceptance of delegated authority. *Id.* (citing 1 Op. Sol. 872 (Feb. 17, 1939)). The Court found that these opinions provided "the most specific historical evidence on the question before us and, we think, support our conclusion." *Id.*

80. *Id.* at 692 (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978)).

81. *Id.* at 693.

82. *Id.*

83. *Id.* at 694. The Court rejected jurisdiction based on implied consent and minimum contacts because they applied to both non-Indians and nonmember Indians. The Court added that interests in effective law enforcement provided no basis for tribal jurisdiction in either *Oliphant* or *Duro*. *Id.* at 695-96.

84. *Id.* at 693 (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 334-35 (2d ed. 1982)).

suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right."[85]

IV. ANALYSIS OF IMPLIED DIVESTMENT OF POWER INCONSISTENT WITH DEPENDENT STATUS

Oliphant and *Duro* weakened the power of tribal courts and reduced faith in their competence.[86] Although the persuasive power of *Oliphant* has created a legacy of cases that questions the validity of tribal justice, the reasons for the legacy are unclear. The decision was predominantly a historical discussion in search of some express treaty or act to divest tribes of their retained sovereignty over non-Indians. "Commentators have sharply criticized the Court's use of historical authority in *Oliphant* to support its first two arguments."[87] However, *Oliphant*'s third, nonhistorical, implicit divestment idea is cited with frequency. Implicit divestment curbs tribal powers by more than just express treaty and express statute divestment. In other words, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, *or by implication as a necessary result of their dependent status.*"[88]

Duro relied heavily on *Oliphant*'s implicit divestment doctrine. In cases of implicit divestment, *Oliphant* and *Duro* recommend that Congress delegate power to tribes.[89] Congress could have accepted the Court's advice in *Duro* and delegated the jurisdiction to tribes. Rather than support implicit divestment by delegating jurisdiction, it is significant that Congress chose to affirm inherent tribal power. Congress's plenary powers over Indian af-

85. *Id.* To resolve enforcement problems, Kennedy suggested that tribes restrain and eject undesirable persons from tribal land and transport offenders to proper authorities in cases where jurisdiction rested outside the tribe. *Id.* at 696-97. Though some states do not have the authority to govern Indian country crimes, and though federal authority may be lacking over minor crimes under 18 U.S.C. § 1152, the Court did not endorse the theory of a jurisdictional void. *Duro*, 495 U.S. at 697-98.

86. Tracy v. Superior Court, 810 P.2d 1030, 1044 (Ariz. 1991) (en banc).

87. Duro v. Reina, 821 F.2d 1358, 1362 n.2 (9th Cir. 1987) (citing Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 490-99 (1979)), *rev'd*, 495 U.S. 676 (1990); *see also* T. Christopher Kelly, Note, *Indians—Jurisdiction—Tribal Court Lacks Jurisdiction over Non-Indian Offenders*, 1979 WIS. L. REV. 537, 540-51.

88. United States v. Wheeler, 435 U.S. 313, 323 (1978) (emphasis added).

89. Duro v. Reina, 495 U.S. 676, 686, 698 (1990); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210-12 (1978). After the Curtis Act suppressed the governmental power of tribes, the Indian Reorganization Act professed the "right to organize." 25 U.S.C. § 476 (1988). Reinstatement of the inherent power of tribes may put to rest *Duro*'s innuendo that powers described by the Indian Reorganization Act simulate federally delegated powers. "Indian tribes already had such power under 'existing law.'" *Wheeler*, 435 U.S. at 327-28.

fairs[90] and Congress's use of tribal "inherent" power rather than federally delegated power may deflate the implicit divestment legacy spread by *Oliphant* because *Oliphant* and *Duro* are remarkably similar.

Resemblances between the two cases begin with the notion of dependence.[91] *Oliphant* surmised that the Suquamish treaty's acknowledgement of dependence probably meant that the United States exclusively would arrest and try non-Indians.[92] *Duro* noted that dependent status caused implicit divestment of tribal power over nonmember Indians.[93] In contrast to *Duro* and *Oliphant*, dependence could be interpreted in *Worcester* as tribal allegiance with one nation. A foreign nation would secure a tribe's allegiance, or dependence, through treaties that would prevent the tribe from forming alliances with other foreign nations. A tribe's allegiance was acquired in exchange for some form of payment. However, tribes retained their governmental *independence*.[94]

> [S]o long as their actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country; and this was probably the sense in which the term was understood by them.[95]

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90. Congress's authority over Indian affairs is plenary. *See* COHEN, *supra* note 84, at 217. Implicit divestment is weakened by Congress's nondelegation approach in *Duro* because the notion of implicit divestment is court-created and therefore secondary to Congress's plenary legislative authority. This reading of the new act assumes that Congress's nondelegation approach reflects Congress's disagreement with the Court's use of implicit divestment in *Duro*.

91. Kelly, *supra* note 87, at 542-43.

92. *Oliphant*, 435 U.S. at 206-08.

93. *Duro*, 495 U.S. at 686.

94. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552-61 (1832). United States v. Wheeler, 435 U.S. 313, 323 (1978), restated *Oliphant*'s version of incorporation and dependence in terms of protection: "Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." *Id.* at 323. In contrast, Marshall wrote that treaties stipulated that tribes would be protected, meaning that tribes would only associate with one nation. In return, the protector would restrain invaders. *Worcester*, 31 U.S. (6 Pet.) at 551-56. Protection "involved, practically, no claim to their lands, no dominion over their persons." *Id.* at 552. Specifically protection:

> [M]erely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.
>
> . . . .
>
> The same stipulation entered into with the United States, is undoubtedly to be construed in the same manner. . . . Protection does not imply the destruction of the protected.

Id.

95. *Worcester*, 31 U.S. (6 Pet.) at 547. Treaties such as the 1791 Cherokee Treaty of Holston announced friendship and dependence on the United States for protection from "lawless and injurious intrusions into their country. . . . This relation was that of a nation claiming and receiving

Oliphant's alternative definition is in tune with the trend to generalize the term "dependence," but conflicts with the principle requiring doubtful statutory or treaty language to be construed in favor of tribes.[96] A favorable interpretation could find that tribes retained jurisdiction that was *concurrent* with any federal jurisdiction.[97]

In addition to showing the versatile connotations of the dependency ingredient of implicit divestment, *Duro* and *Oliphant* are examples of the one-sided application of the implicit divestment doctrine. Specifically, while tribes' authority can be implicitly divested by federal courts, federal courts generally do not imply changes in Congress's plenary power over tribes. Occasionally, federal courts imply an extension of express congressional authority over tribes when the matter is closely related to a federal statute, such as the inclusion of lesser-included offenses in Major Crimes Act cases.[98] Normally, however, extensions by implication are avoided. Relations between Indians are controlled by customs and laws of the tribe unless "*Congress expressly* or clearly directs otherwise."[99] Absent express provisions, tribes are not subject to statutes unless congressional intent indicates otherwise.[100] Indian tribes also remain subject to congressional directives until the acts are expressly repealed.[101] Thus, in federal courts, congressional power over tribes is fixed more or less expressly, whereas tribal power is not so predictable because implicit divestment allows federal courts to liberally diverge from treaties or acts.

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the protection of one more powerful, not that of individuals abandoning their national character, and submitting as subjects to the laws of a master." *Id.* at 555.

96. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973). Though dependency definitions have differed, *see, e.g.*, United States v. Celestine, 215 U.S. 278, 291 (1909), *Worcester*'s definition emanates from charter and treaty interpretations. *Worcester*, 31 U.S. (6 Pet.) at 542-47, 555.

97. *See* Kelly, *supra* note 87, at 545, 548-51.

98. Keeble v. United States, 412 U.S. 205 (1973), held that Indians prosecuted in federal court under the Major Crimes Act were entitled to jury instructions on lesser-included offenses not enumerated in the Act because persons covered by the Act are to be tried in the "same manner, as are all other persons." *Keeble*, 412 U.S. at 211-12 (quoting Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. §§ 1153, 3242 (1988))). The Court reasoned that Congress did not intend to deprive Indian defendants of procedural rights guaranteed other defendants or to make it easier to convict Indians. *Id.* at 212.

99. United States v. Quiver, 241 U.S. 602, 606 (1916) (emphasis added); *see also Keeble*, 412 U.S. at 209 (The Major Crimes Act is "a carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land.").

100. For example, adultery between Indians was not an offense expressly included within federal jurisdiction. Therefore, the Court did not apply the federal law to tribes. "To justify a court in holding that these laws are to be applied to Indians, there should be some clear provision to that effect." *Quiver*, 241 U.S. at 606.

101. *Id.*; *see also* Morton v. Mancari, 417 U.S. 535, 546-48 (1974).

Additionally, *Duro*'s and *Oliphant*'s implicit divestment doctrine involves the notion of incorporation, insofar as tribes are deemed to be implicitly divested of authority, by virtue of their dependent status, at their incorporation into the United States. This incorporation ingredient of the implicit divestment doctrine harkens back to the doctrine of discovery.

The discovery reference occurred by means of *Oliphant*'s citation to *Johnson v. M'Intosh*.[102] According to *Oliphant, M'Intosh* viewed incorporation as foreclosing the tribal ability to freely alienate land or to act as independent nations.[103] *M'Intosh* referred to the discovery doctrine and emphasized discovery's potentially unbridled power over tribes[104] and the difficulty of incorporating tribes.[105] However, *Worcester v. Georgia*[106] subsequently limited the enormous divestment potential of the discovery doctrine, and in contrast to *Oliphant*'s expansive incorporation choice, *Worcester* chose to promote and shield tribal self-government.[107] *Oliphant*'s use of *M'Intosh* is an ironic reminder that today's tribal governments have lost more power during the modern day policy of self-governance than the tribes lost under the doctrine of discovery.[108]

In addition to the discovery allusion, the notion of incorporation imposes uniformity. *Oliphant* and *Duro* divested tribes in 1978 and 1990, respectively, even though tribes signed variant treaties at different times and even though tribes can be subject to different legislation. Thus, application of implicit divestment at incorporation tends to lump all tribes together without regard for the varying treatment of different tribes at different times, thereby contradicting *Duro*'s concern that tribal members not be treated as "homogenous persons among whom any Indian would feel at home."[109]

The implicit divestment doctrine is unclear as to when implied losses occur, despite *Duro*'s and *Oliphant*'s insistence that divestment occurred at the incorporation of the tribes into the United States. Implicit divestment can counterfactually declare tribal powers to be lost at some point in the past, such that decades or centuries of incorporation into the United States

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102. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978) (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823)).

103. *Id.* at 209.

104. *M'Intosh*, 21 U.S. (8 Wheat.) at 586-90.

105. *Id.* at 589-91.

106. 31 U.S. (6 Pet.) 515 (1832).

107. *Id.*

108. *See generally* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1 (discussing discovery, incorporation, and other doctrines used in Indian law).

109. Duro v. Reina, 495 U.S. 676, 695 (1990).

pass before tribes are known to be divested of jurisdiction over non-Indians and nonmember Indians.

Difficulties in pinning the application date of divestment to a time of incorporation demonstrates that implicit divestment is a difficult doctrine to apply. Tribes could not reasonably be expected to infer the losses of jurisdiction expressed in *Oliphant* and *Duro* because congressional statements do not show that tribal jurisdiction was clearly lost. In 1834, a House report stated that federal jurisdiction over tribes or non-Indians was not necessarily permanent or exclusive:

> By the act of 3d March, 1817, the criminal laws of the United States were extended to *all persons* in the Indian country, without exception, and by that act, as well as that of 30th March, 1802, they might be tried wherever apprehended. It will be seen that we cannot, consistently with the provisions of some of our treaties, and of the territorial act, extend our criminal laws to offences committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own [non-Indian] citizens. And this provision is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government. It is not perceived that we can with any justice or propriety extend our laws to offences committed by Indians against Indians, *at any place* within their own limits.[110]

This congressional statement illustrates the possibility of retained sovereignty, particularly when sovereignty is examined from the perspective of express divestment. Under an exclusively express divestment rationale, the lack of a divesting statute can reserve to a tribe jurisdiction over non-Indians when a tribe's treaty did not expressly divest concurrent tribal jurisdiction.[111] In conjunction with historical factors supporting inherent and retained tribal power, historical evidence supporting the retention of greater tribal jurisdiction can be found by examining the United States custom of establishing extraterritorial jurisdiction.[112] For the most part, tribes and

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110. H.R. REP. No. 474, 23d Cong., 1st Sess. 13 (1834), *reprinted in* COHEN, *supra* note 84, at 116-17.

111. *See supra* notes 54, 97 and accompanying text.

112. *Cf.* Reid v. Covert, 354 U.S. 1 (1957). In the 19th century, pursuant to Rev. Stat. §§ 4083-4130 (1878), American consuls tried "American citizens charged with committing crimes in Japan and certain other 'non-Christian' countries." *Reid*, 354 U.S. at 10. Such jurisdiction was a grant of power from the foreign nation to the United States pursuant to treaty. Absent treaty provisions, U.S. citizens were subject to the plenary jurisdiction of the foreign nation where an offense occurred. *Id.* at 15 n.29. Justice Frankfurter's concurring opinion noted that the practice of seeking extraterritorial jurisdiction over citizens pursuant to treaty was believed to be necessary in light of the view that some countries' systems of justice were considered so inferior that justice

the federal government forbade public, non-Indian settlements in Indian country until allotment[113] but permitted some non-Indians to enter Indian country. Federal jurisdiction over these few non-Indians was assumed under treaties or acts in which the federal government had citizen jurisdiction but generally not Indian jurisdiction unless it was to cover disputes between citizens and non-citizen Indians.[114]

The federal government's extraterritorial jurisdiction practices in Indian country corresponded to similar arrangements overseas, where federal jurisdiction over U.S. citizens in certain non-Christian countries represented a grant of power from the foreign sovereign to the United States that did not divest the inherent sovereignty of the host country.[115] This analogy between federal Indian law and federal extraterritorial jurisdiction is drawn mainly to show the recurrence and convergence of the principles and to show that if this principle were applied to tribes, greater powers of tribal governments would be retained rather than impliedly divested because *concurrent* tribal authority over non-Indians had not been expressly divested even after allotment.[116]

Nevertheless, the effect of *Oliphant* has been to extend implicit divestment. *Montana v. United States*[117] weakened tribal authority by extending *Oliphant*, which involved criminal jurisdiction, to the civil context. As a result, tribal civil control over non-Indians in Indian country is generally determined by contractual-type relations or the protection of tribal integrity.

Specifically, *Montana* held that tribes generally may not regulate nonmember hunting and fishing on nonmember fee land within Indian country.

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could not be obtained by citizens within the foreign court system, especially with respect to Far Eastern and Moslem nations. *Id.* at 55-64 (Frankfurter, J., concurring).

Generally, United States criminal jurisdiction is based on territorial principles, and criminal statutes are not given an extraterritorial effect. United States v. Flores, 289 U.S. 137, 155-57 (1933). Nevertheless, absent a treaty provision, United States admiralty jurisdiction extends to crimes committed within the territorial jurisdiction of foreign sovereigns. *Id.* A ship flying a U.S. flag is part of the U.S. territory. *Id.* However, in the port of another sovereign, U.S. jurisdiction is not exclusive. The crew is answerable to the laws of the place. *Id.* at 150, 157-59. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), noted that the extraterritorial power of every legislature is limited to its own subjects. *Id.* at 542. This might explain the practice of asserting federal or state jurisdiction over crimes involving non-Indians and the general exclusion of federal or state jurisdiction over Indian-against-Indian crimes in Indian territory. *See supra* notes 12-14, 30, 31. Under an extraterritorial paradigm, federal or state jurisdiction over non-Indians in Indian country would not be exclusive.

113. *See, e.g.*, Montana v. United States, 450 U.S. 544, 558 (1981).

114. *See, e.g.*, Trade and Intercourse Act, ch. 13, 2 Stat. 143 (1802); *see also* supra note 112.

115. *Reid*, 354 U.S. at 15 n.29.

116. *Cf.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

117. 450 U.S. 544 (1981).

First, *Montana* noted that while treaty provisions guaranteeing exclusive use of lands to the tribe would have permitted tribes to regulate nonmembers, allotment diminished tribal power over lands held in fee by nonmembers.[118] Second, the inherent sovereignty of tribes would not support tribal regulation of nonmembers because that power was implicitly divested. The Court reasoned that "[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[119] However, *Montana* added that tribes may regulate non-Indians who enter into consensual relations with the tribe through commercial dealings, contracts, leases, or other relationships.[120] "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[121] Consequently, *Montana* changed the presumption of retention of tribal sovereign power to a presumption of implicit loss of tribal civil power over non-Indians in Indian country.

In summary, the implicit divestment doctrine and its characterizations of dependence and incorporation fail to delineate for courts or tribes the bounds of tribal power[122] and fail, for example, to recognize that non-Indian crime or civil conduct nearly always has "some direct effect" on tribes.[123] *Duro*'s reliance on *Oliphant* and Congress's subsequent eradication of *Duro* should signal the close of an unworkable doctrine. The employment of the implicit divestment doctrine should also be discussed in terms of self-government, the intended "finished product" of divestment.

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118. *Id.* at 558-59.

119. *Id.* at 565.

120. *Id.*

121. *Id.* at 566.

122. Both the express and implied divestment methods begin with the presumption that tribes retain inherent powers. *E.g.*, Duro v. Reina, 495 U.S. 676 (1990); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). If retained sovereignty was to be divested by express method only, the result would coincide with an analogous view of state power presented in *The Federalist Papers*:

> [T]he states will retain all *pre-existing* authorities which may not be exclusively delegated to the federal head . . . [a]nd under this impression I shall lay it down as a rule, that the State courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.

THE FEDERALIST NO. 82 at 417-18 (Alexander Hamilton) (Garry Wills ed., 1982).

123. *Montana*, 450 U.S. at 566.

V. INTERNAL SELF-GOVERNANCE

In *Worcester v. Georgia*,[124] Chief Justice Marshall evaluated Article 9 of the Cherokee Treaty. The Article reads as follows:

> [F]or the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper.[125]

Marshall believed that construing the "expression 'managing all their affairs,' into a surrender of self-government, would be . . . a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them"[126] because such a surrender could not be for their "benefit and comfort" or for "the prevention of injuries and oppression."[127] An interpretation calling for the surrender of self-government on subjects not connected with trade would "convert a treaty of peace covertly into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed."[128] Instead, the term "management of affairs" meant trade relations.[129] "[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection."[130]

This self-government description was written during the 1830s removal era. The transition from removal and allotment policies to the present era

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124. 31 U.S. (6 Pet.) 515 (1832).

125. *Id.* at 553 (citation omitted). On self-government, see *id.* at 547-49, 553, 556-57, 560-61; Talton v. Mayes, 163 U.S. 376, 383-85 (1896).

Descriptions of tribal power varied. For example, tribes were not "possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." United States v. Kagama, 118 U.S. 375, 381-82 (1886). *But see* United States v. Rogers, 45 U.S. (4 How.) 567 (1846):

> The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.

Id. at 572.

126. *Worcester*, 31 U.S. (6 Pet.) at 553-54.

127. *Id.* at 554.

128. *Id.* "It is equally inconceivable that they could have supposed themselves . . . to have divested themselves of the right of self-government on subjects not connected with trade." *Id.*

129. *Id.* at 553-54, 556.

130. *Id.* at 560-61.

of self-government policy has been marked by attempts to redefine self-government.[131] *Oliphant*'s and *Duro*'s use of implicit divestment represents one attempt to determine the limits of tribal self-government in a modern context.

Before *Oliphant*, some tribes asserted jurisdiction over all persons disturbing the community. Tribes that claimed criminal jurisdiction over non-Indians governed an entire territory and the people within the territory, regardless of tribal or non-Indian citizenship. *Oliphant*'s historical and implied divestment arguments redefined self-government in a manner that restricts tribal powers in an unnecessarily ambiguous and complex way and ignores that internal self-governance involves tribal power over significant tribal interests. Specifically, *Oliphant* limited tribal powers in terms of territory and citizenship. *United States v. Wheeler*[132] illustrates *Oliphant*'s modern self-government definition:

> [L]imitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.[133]

Because of the emphasis on territory and the division of authority largely along member or citizenship lines, these types of restrictions on tribes resemble the Trade and Intercourse Acts, 18 U.S.C. § 1152, and other extraterritorial-like provisions that outlined federal jurisdiction in Indian country. But, tribal power need not resemble the federal system. A "review of the history of *federal* provisions does not sustain [a] claim of *tribal* power."[134]

A. Territory

From the perspective of territory, the *Oliphant* decision led *Duro* to conclude that tribes no longer retained the "basic attribute of full territorial

131. The other "selves" used in Indian law include self-determination, from the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975), and self-sufficiency, encouraged by the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721 (1988)). The Court's choice of self-government in *Oliphant* and *Duro* is predictable through precedent, yet still intriguing, because its use simultaneously validates and invalidates *Worcester*.

132. 435 U.S. 313 (1978).

133. *Id.* at 326.

134. Duro v. Reina, 495 U.S. 676, 690 (1990).

sovereignty . . . [which] is the power to enforce laws against all who come within the sovereign's territory."[135] The opposite proposition was true at the time of *Worcester*, when the territorial power of tribes was largely intact:

> From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.
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> . . . .
>
> The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union.[136]

Early use of the term "self-government" was bound to territory in a manner that symbolized powers similar to those of nations. Self-government language originated in spatially segregated eras where the space seemed to work as a protection against divestment and as a symbol of government. Thus, intact tribal governments were easily conceptualized and maintained because of the territorial isolation of many tribes from non-tribal citizens.

Indians and non-Indians lived separately at the time of the *Worcester* decision, which noted that Europeans "purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only."[137] This segregation is evidenced by treaties that commonly promised that "[no] white man . . . [shall] be permitted to reside upon the said reservation without [the Tribe's] permission."[138] The 1791 Treaty at Holston stipulated that United States citizens settling on Indian land "shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they please."[139] Often, treaties or the Trade and Intercourse Acts

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135. *Id.* at 685.

136. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556-57 (1832).

137. *Id.* at 547.

138. Treaty with the Yakimas, June 9, 1855, art. II, 12 Stat. 951, 952; *see also* COHEN, *supra* note 84, at 72-73.

139. Treaty at Holston, July 2, 1791, § 8, 7 Stat. 39, 40.

required non-Indians traveling through Indian country to carry passports and allowed for punishment of squatters.[140]

> Federal policy from the beginning recognized and protected separate status for tribal Indians in their own territory. Treaties established distinct boundaries between tribal territory and the areas open to white settlement, and federal laws were enacted to control white entry, settlement, trade, and other activities on tribal lands. . . .
>
> The policy of separating Indians from non-Indians reached its peak with the removal schemes of 1816 to 1846.[141]

Eventually, seclusion gave way to integration. Self-government was diminished and tied to plot ownership.[142] The lack of territorial isolation that reduced a tribe's ability to self-govern is especially due to allotment.

Under the 1887 General Allotment Act,[143] and subsequent allotment acts, tribal land was divided and Indians were allotted parcels. The parcels were held in trust by the federal government for twenty-five years or longer. Some lands remaining after individual tribal members received allotments were purchased by the federal government for homesteading.[144] By the time the allotment era ended, more than 90,000,000 acres of Indian land were lost.[145] Allotment was designed to dispose of tribal governments by subjecting Indians to citizenship and state laws once the federal trust period ended. However, the Indian Reorganization Act of 1934[146] halted land allotment, reaffirmed tribal governments, and indefinitely extended the period during which the federal government would hold lands in trust.

Allotment left Indian country a checkerboard of sporadic non-Indian land holdings.[147] *Worcester*'s complete prohibition against state authority in Indian country gave way to toleration of state law.[148] States were deemed to hold a legitimate interest in the affairs of non-Indian citizens in

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140. *See supra* note 14.

141. COHEN, *supra* note 84, at 28 (citations omitted). "The objective was to remove the tribes to the West beyond the boundaries of white settlement. Voluntary at first, removal became forced under the Jackson Administration in the 1830s." *Id.*

142. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 112 S. Ct. 683, 697 (1992) (Blackmun, J., dissenting in part and concurring in part).

143. Indian General Allotment Act (Dawes), ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.).

144. *County of Yakima*, 112 S. Ct. at 697 (Blackmun, J., dissenting in part and concurring in part).

145. *Id.* (Blackmun, J., dissenting in part and concurring in part).

146. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1988)).

147. *See County of Yakima*, 112 S. Ct. at 690-92 (Blackmun, J., dissenting in part and concurring in part).

148. Williams v. Lee, 358 U.S. 217, 219-20 (1959).

Indian country, and this interest inevitably encroached upon tribal self-government.[149] However, state law could not preempt federal law,[150] and Congress should expressly grant to states the power over Indians.[151] Thus, minimal state jurisdiction should have been expected in the aftermath of the Indian Reorganization Act's repudiation of allotment. In 1980, the Court remarked, "Tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."[152]

To the benefit of self-government, cases and acts fostered the post-allotment notion of geographic and jurisdictional continuity within the boundaries of Indian country.[153] For example, in 1948 Congress redefined Indian country in 18 U.S.C. § 1151 to include all land within the boundaries of an existing reservation, notwithstanding the issuance of any patent.[154] By this act, "Congress uncouple[d] reservation status from Indian ownership, and statutorily define[d] Indian country to include lands held in fee by non-Indians within reservation boundaries."[155]

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149. McClanahan v. State Tax Comm'n, 411 U.S. 164, 171-79 (1973). *Williams* noted that "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220; *see* Fisher v. District Court, 424 U.S. 382 (1976).

150. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Central Mach. v. Arizona Tax Comm'n, 448 U.S. 160 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

151. *Williams*, 358 U.S. at 220-21; *see also Cabazon Band of Mission Indians*, 480 U.S. at 207; Montana v. Blackfeet Tribe of Indians, 471 U.S. at 759, 765 (1985).

152. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980); *see also* Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 686-87 (1965) ("[F]rom the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference.").

153. In United States v. Celestine, 215 U.S. 278, 285-86 (1909), the Court noted that the Treaty at Point Elliot, Jan. 22, 1855, 12 Stat. 927, provided for allotment, and that the defendant was a citizen. *Id.* at 289. The Court still held that the murder of one Indian citizen by another on patented land was covered by the Major Crimes Act instead of state law. Once Congress has "established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Id.* at 285. After the allotment era, *Celestine* was cited for this same proposition. Solem v. Bartlett, 465 U.S. 463, 470 (1984); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 359 (1962).

154. Although allotment acts specific to certain tribes diminished the outer boundaries of some reservations, causing ceded land to lose its Indian country status, nonceded land within the diminished borders retained Indian country status. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). Trust land located outside of a reservation with diminished boundaries is also Indian country under 18 U.S.C. § 1151 (1988). Opening reservations for homesteading did not always diminish the boundaries of the reservation. Many tribal allotments simply permitted non-Indians to settle within the existing reservation, which remained all Indian country. *Solem*, 465 U.S. at 470; *Seymour*, 368 U.S. at 356.

155. *Solem*, 465 U.S. at 468.

In the same context, *Moe v. Confederated Salish & Kootenai Tribes*[156] noted that the General Allotment Act had not been expressly repealed but found checkerboard jurisdiction to be inconsistent with the intent embodied in the Indian Reorganization Act's repudiation of allotment.[157] The Court rejected checkerboard jurisdiction, stating that if "the existence or nonexistence of an Indian reservation, and therefore existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land,"[158] then law enforcement officials would have to "search tract books" in order to determine where jurisdiction extended.[159]

In opposition to indications of the elimination of checkerboard allotment policy, and in opposition to the general bar on state authority over tribes, a mix of *Oliphant*'s non-Indian propositions and geographic territory combined to produce a territorially disruptive tribal zoning scheme in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*.[160] *Brendale* held that the Yakima Nation lacked the authority to implement a continuous zoning plan on its reservation, which was composed of twenty percent Indian and non-Indian fee land, and eighty percent Indian land held in trust.[161] *Brendale* found, *inter alia*, that the tribe could not completely zone the checkerboard area, despite the Yakima treaty provision guaranteeing the "exclusive use and benefit" of reservation land to the tribe, because the Indian Reorganization Act did not restore exclusive use of the reservation to the tribe.[162] Using *Oliphant*'s suggestion that historical records be evaluated in terms of the events of the era, *Brendale* utilized repudiated allotment era policy and concluded that the congressional intent of allotment would not expose some non-Indian fee land to tribal zoning authority.[163]

Brendale also questioned whether inherent sovereignty permitted the tribe's actions. Citing *Montana*, *Oliphant*, and *Wheeler*, the Court concluded that inherent sovereignty did not support the zoning of non-Indian fee land. Inherent sovereignty was determined by what the Court viewed as necessary to protect internal self-government. Tribes were divested of any

156. 425 U.S. 463 (1976).

157. *Id.* at 477-79. Eventually, *Moe* would be revisited outside the context of tribal post-allotment, geographic continuity. *See* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 112 S. Ct. 683 (1992).

158. *Moe*, 425 U.S. at 478 (quoting *Seymour*, 368 U.S. at 358).

159. *Id.* (quoting *Seymour*, 368 U.S. at 358).

160. 492 U.S. 408 (1989) (plurality opinion).

161. *Id.* at 415 (plurality opinion).

162. *Id.* at 423 (plurality opinion).

163. *Id.* at 421-25 (plurality opinion).

power inconsistent with their dependent status, "that is, to the extent it involve[d] a tribe's 'external relations.' "[164]

Consequently, *Brendale* can permit some county zoning in Indian areas even though Indian regions can cross county, state, and national borders.[165] Further, *Brendale's* dependency analysis of tribes' power over non-Indians led to the assertion that express matters need not always be consulted: "Given our disposition of these cases, we need not address whether the Yakima Nation's retained sovereignty might also have been divested by treaty or statute."[166]

Brendale's reactivation of allotment hinders territorially cohesive exercises of tribal self-government. The apparent postallotment understanding of Indian country's geographic continuity can be interpreted as illusory for tribes for several indirect reasons. First, shortly before allotment, statehood altered the *federal* jurisdictional scheme in Indian country by transferring criminal jurisdiction over non-Indians from the federal government to the states.[167] Then, in 1978, *Oliphant* allowed exclusive state criminal jurisdiction over non-Indians. Finally, in 1981, *Montana's* use of *Oliphant* altered tribal civil authority, thereby establishing non-Indians and their land plots as a force nearly independent of the states.[168] The presumptive loss of tribal power over non-Indians and their land[169] has meant that important aspects of tribal self-government could be placed exclusively in the hands of the state, not by any affirmative state empowerment, but by default.[170]

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164. *Id.* at 426 (plurality opinion).

165. For example, only two-thirds of the Navajo reservation lies within Arizona. The St. Regis Mohawk land crosses an international boundary, with reservation land designated on both sides by Canada and the United States.

166. *Brendale*, 492 U.S. at 426 n.9 (plurality opinion).

167. United States v. McBratney, 104 U.S. 621 (1881). Recently, North Dakota re-evaluated its original constitution and enabling act and overturned 35-year-old case law. The state determined that it had jurisdiction over misdemeanor crimes committed by Indians on the reservation and could therefore ignore the tribe's extradition agreement with the state. State v. Hook, 476 N.W.2d 565 (N.D. 1991).

168. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 112 S. Ct. 683 (1992), summarized that states had criminal "and implicitly, civil" jurisdiction over non-Indians. *Id.* at 688. According to *Montana*, regulating non-Indian hunting and fishing on fee land was inconsistent with tribes' dependent status and "bears no clear relationship to tribal self-government or internal relations." Montana v. United States, 450 U.S. 544, 564 (1981). By not permitting the tribe to regulate fishing or hunting, *Montana* found a plot-based, checkerboard, tribal self-government description similar to *Brendale.*

169. *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981).

170. For example, Stock West Corp. v. Taylor, 942 F.2d 655 (9th Cir. 1991), held that the district court erred in dismissing a case, brought by a non-Indian corporation against a non-Indian tribal attorney, for failing to exhaust tribal court remedies. The non-Indian status of both parties was relevant to the determination that the federal court rather than the tribal court should hear the case. *Id.* at 661, 663. Judge Fernandez dissented and remarked: "What we are doing here is

"[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States,"[171] yet, withdrawal of tribal jurisdiction may implement state regulatory authority, even though neither the General Allotment Act[172] nor Public Law 280 federally grants states *regulatory* authority.[173] Thus, unless tribal integrity is imperiled or relations are contractual,[174] state regulation of non-Indian property can preclude tribes' continuous land regulatory schemes to the obvious detriment of tribal self-government. Accordingly, the very territory that protected tribal governments when they were isolated, dismantled tribal powers well after allotment, despite the Indian Reorganization Act and an amended definition of Indian country in 18 U.S.C. § 1151.

County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation[175] confirmed the Court's recent trend of narrowly construing the Indian Reorganization Act's repudiation of allotment. In *County of Yakima*, the state successfully taxed Indian fee land under provisions of the General Allotment Act and its Burke Act Amendment. The Court reasoned that the Indian Reorganization Act halted allotment, but "Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands."[176] Allotment was not rendered a 'dead letter' through an implied repeal by the Indian Reorganization Act.[177] "[I]t is a 'cardinal rule . . . that repeals by implication are not favored,' " and *Moe* made no mention of an implied repeal of the Allotment Act.[178] Because *County of Yakima* is a tax case, tribes' continuous regulatory authority over land is not affected in the same sense as *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,[179] where zoning should be

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allowing Stock West to drag its dispute with the tribe through the back door of the federal courthouse. The parties know that, the tribe knows it, the district judge knows it, we know it. So does the law." *Id.* at 668 (Fernandez, J., dissenting).

171. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980).

172. *See* Brendale v. Confederated Tribes & Bands of the Yakima Nation, 492 U.S. 408, 436 (1989) (plurality opinion) ("The Dawes Act did not itself transfer any regulatory power from the Tribe to any state or local governmental authority.").

173. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (As opposed to criminal prohibition, state regulatory authority refers to laws that apply to conduct generally permissible in a state; Public Law 280 does not grant states civil regulatory authority in Indian country); Bryan v. Itasca County, 426 U.S. 373 (1976).

174. Montana v. United States, 450 U.S. 544, 565-66 (1981).

175. 112 S. Ct. 683 (1992).

176. *Id.* at 686.

177. *Id.* at 688-89.

178. *Id.* at 690.

179. 492 U.S. 408 (1989) (plurality opinion).

regionally continuous, and *Montana v. United States*,[180] where hunting laws should be regionally continuous. Nevertheless, *County of Yakima* is instructive for reasons beyond its bolstering of allotment.

First, *County of Yakima* makes clear that state power would not be implicitly divested[181] and that only tribal power faced such divestment. Second, the territorial suggestions of *County of Yakima* and *Brendale* inhibit use of the tribal power of exclusion for the maintenance of self-government. For instance, *Duro* suggested that one way to resolve law enforcement problems in Indian country would be through the exclusion of individuals from tribal lands.[182] However, *Brendale* found that the tribes no longer had the power to exclude non-Indians from their lands.[183] Thus, the reality of excluding perpetrators from tribal lands in lieu of actual criminal jurisdiction is a limited, if not a useless, solution given the checkerboard nature of Indian country, which includes not only tribal land, but also Indian and non-Indian fee land.

Finally, *County of Yakima* revisited *Moe v. Confederated Salish & Kootenai Tribes*[184] in the postallotment, procheckerboard context and interpreted *Moe* to condemn a checkerboard pattern "in which an Indian's personal law would depend upon his parcel ownership."[185] Yet, the power of tribes to exclude non-Indians, as discussed in *Brendale*, can depend on non-Indian parcel ownership because *Brendale* limited the ability of tribes to exclude non-Indians from their fee land.[186] Thus, the *Brendale* situation governing non-Indian exclusions is forbidden by *County of Yakima*, which condemned personal law fluctuations caused by plot ownership.[187]

In summary, some contemporary attempts to define self-government emanate from *Oliphant*'s initial divestment of tribal authority over non-Indians. The self-government definitions apply territorially disruptive criminal and civil jurisdiction schemes. The Indian Reorganization Act rejected allotment and reaffirmed tribal governments. Accordingly, self-government should not be defined in terms of allotment, which fosters state self-governance more than tribal self-governance.

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180. 450 U.S. 544 (1981).

181. *County of Yakima*, 112 S. Ct. at 696 (Blackmun, J., dissenting in part and concurring in part).

182. Duro v. Reina, 495 U.S. 676, 696-97 (1990).

183. *Brendale*, 492 U.S. at 423 (plurality opinion).

184. 425 U.S. 463 (1976).

185. *County of Yakima*, 112 S. Ct. at 690.

186. *Brendale*, 492 U.S. at 422-23 (plurality opinion).

187. *County of Yakima*, 112 S. Ct. at 690-91.

Other recent definitions of self-government are discussed in the next two sections. These definitions concern the designations of governable citizens within the territory, including *Oliphant*'s government participation concept and *Duro*'s membership concept.

B. Government Participation and Membership

1. Government Participation

Non-Indian participation in the federal government predated Indian participation and allowed non-Indians to acquire Indian land. Nonmembers currently participate in state and federal governments, yet cases popularly allude to nonmember disenfranchisement. For example, *Brendale* raised government participation issues by noting that land in the Yakima reservation was partially owned by non-Indians who represented a large part of the population yet lacked participation in tribal governance.[188]

Oliphant set the groundwork for the participation questions raised in *Duro* by excluding non-Indians from tribal criminal jurisdiction. Specifically, non-Indians could not vote, hold office, or sit on a tribal jury; hence, the application of criminal jurisdiction was inappropriate. *Duro* used this argument to assert that nonmember Indians had a synonymous relationship with tribes and, as a result, should be accorded the same treatment as non-Indians.[189] *Duro*'s assertion requires the assumption that the appropriate class of persons to be governed by tribal criminal law should be defined by participation in government.

Although the justification for federal Indian legislation lies in the status of an Indian tribe as a sovereign political entity,[190] government participation does not serve as an appropriate indicator of tribal criminal jurisdiction for several reasons. First, in identical federal or state situations, no political affiliation is necessary for those governments to assert criminal jurisdiction over aliens. Instead, the status of the prosecutor as a *governing body* within a territory renders the power to adjudicate criminal offenses.[191] Moreover,

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188. *Brendale*, 492 U.S. at 415.

189. Duro v. Reina, 495 U.S. 676, 688 (1990). Generalization of the Court's *Oliphant* and *Duro* decisions to tribes beyond those in the cases does so at the cost of ignoring the practices of many tribes. For instance, for many years the Chief Judge at the Cheyenne River Sioux Tribal Court was a non-Indian who "participated" in tribal government in that sense.

190. United States v. Antelope, 430 U.S. 641, 645-47 (1977); Morton v. Mancari, 417 U.S. 535 (1974). Fisher v. District Court, 424 U.S. 382 (1976), held that exclusive tribal court jurisdiction over adoptions was permissible. The Court reasoned that even if an Indian plaintiff were denied a forum that a non-Indian could access, the treatment is derived from the quasi-sovereign status of tribes and is justified because it is intended to benefit the class of Indians by furthering the policy of Indian self-governance. Id. at 390.

191. *Cf.* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). *Merrion* stated:

if political participation were required to govern criminal matters, the federal government should not have imposed the 1885 Major Crimes Act or other federal laws on Indians who did not all become citizens until 1924. Additionally, lack of government participation does not prevent tribal court jurisdiction over non-Indians in some civil matters.[192]

If government participation were simply the only nonracial link between nonmember Indians and non-Indians, the elimination of *Duro* by legislation would mean that the current nonmember Indian inclusion and the non-Indian exclusion from *tribal* jurisdiction are impermissibly based on race. Inverse challenges that *federal* laws over tribes constitute racial discrimination have failed.[193] With *Oliphant* still in force over tribal law, the recent reinstatement of tribes' inherent jurisdiction over nonmember Indians could be viewed to reflect *Oliphant*'s ambiguous historical considerations or tribal/non-tribal citizen designations rather than racial designations. At any rate, now that nonmember Indians are included in tribal jurisdiction, government participation can only weakly justify the non-Indian exclusion.

Curiously, when *Duro* made its citizen distinction as one of member Indians, nonmember Indians, and non-Indians, *Duro* altered *Montana* by re-extending tribal authority over nonmember and non-Indian land. *Montana* had made authority over nonmember or non-Indian land contingent

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> Whatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority. Requiring the consent of an entrant deposits in the hands of the excludable non-Indian the source of the tribe's power, when the power instead derives from sovereignty itself. Only the Federal Government may limit a tribe's exercise of its sovereign authority. Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.

Id. at 147 (footnote omitted).

192. *E.g.*, *Duro*, 495 U.S. at 688; National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

193. In *Antelope*, the exercise of federal jurisdiction over Indians accused of offenses enumerated in the Major Crimes Act constituted a valid exercise of federal law despite the use of state laws in cases involving non-Indians charged with committing the same crime in the same place. Federal Indian tribe legislation is not derived from impermissible racial classifications, but rather from the quasi-sovereign status of tribes. That the particular state law covering non-Indians may prove more lenient in some cases has no bearing:

> Under our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of the States with respect to the same subject matter. The Federal Government treated respondents in the same manner as all other persons within federal jurisdiction, pursuant to a regulatory scheme that did not erect impermissible racial classifications.

Antelope, 430 U.S. at 649-50 (footnotes omitted); *see also* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 479-80 (1976) (If treatment can be tied rationally to fulfillment of Congress's unique obligation toward Indians, such legislation can be imposed.).

on (1) a necessity to preserve tribal integrity or (2) a contractual relationship.[194] *Duro* added that civil authority over nonmembers and non-Indians "typically involves situations arising from *property ownership* within the reservation."[195]

Thus, once *Duro* fully established its vision of citizen divisions, it reinstated a presumption of tribal civil land-plot control. This control is especially important in cases like zoning, where regions must be continuously controlled. To keep such tribal authority, the new *Duro* legislation could be read to both reaffirm tribes' inherent criminal jurisdiction over non-Indians and to amend the Court's citizen reference point to two groups—tribal and non-tribal citizens.

2. Membership

Oliphant's idea that tribes limit jurisdiction to participants in tribal government extended naturally to *Duro*'s concept of membership. Even if lack of government participation provided a reason for excluding nonmember Indians from tribal criminal jurisdiction, reducing tribal jurisdiction to membership is inappropriate for implied divestment at incorporation because tribes, not the federal government, have historically governed relations with other tribes.[196] The Indian-against-Indian exception to federal jurisdiction in 18 U.S.C. § 1152 does not distinguish between tribes, indicating little federal concern about the tribe to which an accused criminal belonged under tribal law. In fact, before tribes began collecting information for membership rolls under the Indian Reorganization Act, federal membership records kept for federally imposed matters such as allotment were sometimes inaccurate.[197] However, the federal government acknowledged the presence of nonmember Indians on reservations. For instance, federal CFR courts have jurisdiction over member and nonmember Indians, and federal Major Crimes Act jurisdiction applies to Indians in Indian country irrespective of whether the perpetrator committed the crime on his home

194. Montana v. United States, 450 U.S. 544, 565-66 (1981).

195. *Duro*, 495 U.S. at 688 (emphasis added).

196. *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

197. United States v. John, 437 U.S. 634 (1978). The Court remarked that the federal government failed to fulfill its obligations to the tribe because of "incompetence, if not corruption" in the removal and recordation process, which "proved an embarrassment and an intractable problem for the Federal Government for at least a century." *Id.* at 643; *see also* DeCoteau v. District County Court, 420 U.S. 425, 437 n.16 (1975) (indicating that accurate enrollment for the purpose of allotment was nearly impossible); *Ex parte* Pero, 99 F.2d 28, 31-32 (7th Cir. 1938) (Woman was not enrolled in her tribe because she was too young and her mother was away.); Winton v. Amos, 255 U.S. 373 (1921) (chronicling federal attempts to record and define members of the Choctaw Nation).

reservation.[198] *Duro*'s concern that nonmembers would be tried by alien courts is at least belated given the federal practice of placing different tribes into the same reservations during the removal era[199] while other tribes were divided up and placed on separate reservations.[200]

If *Duro* had been applied, it is unclear which membership definition would have been used. Different federal acts define the term "Indian" differently. Thus, a person may be a member for some federal purposes but not others.[201] Furthermore, the federal criminal statutes do not define "Indian" for purposes of federal jurisdiction. Consequently, federal confusion exists over Indian status and tribal affiliation.[202] This is apparent in federal cases where the tribe was admitted into the United States relatively late,[203] where persons are classified as members by adoption rather than race,[204]

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198. *Duro*, 495 U.S. at 689-90. Distinctions between members and nonmembers are not always drawn. In Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976), the Court held that Indians in Indian country were exempt from certain state taxes. The exemption applied "irrespective of their actual membership." *Id.* at 480-81 n.16.

199. Elizabeth A. Harvey, *The Aftermath of* Duro v. Reina: *A Congressional Attempt to Reaffirm Tribal Sovereignty Through Criminal Jurisdiction over Nonmember Indians*, 8 COOLEY L. REV. 573, 588 (1991).

200. *Id.*

201. COHEN, *supra* note 84, at 26.

202. Under federal law, lack of enrollment in an Indian tribe is not determinative of Indian status. *Ex parte* Pero, 99 F.2d 28, 31 (7th Cir. 1938).

203. *See* United States v. Sandoval, 231 U.S. 28 (1913). In *Sandoval*, the Court decided that federal Indian laws applied to the Pueblos because the people residing there could be labeled Indians. Deciding their status was necessary so federal laws would not be applied arbitrarily: "The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs and domestic government . . . and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people." *Id.* at 39. For a brief history on the former label of Alaska Native groups as patriarchal rather than tribal, see Native Village of Venetie IRA Council v. Alaska, 944 F.2d 548, 557-58 (9th Cir. 1991) (noting that the patriarchal label "deprive[d] Alaska natives of the same right to sovereignty over their political affairs that Indians in the rest of the United States had.")

204. Nofire v. United States, 164 U.S. 657 (1897), held that the federal courts had no jurisdiction when the defendants were native and the victim was a white man who was adopted by the Cherokee Nation through marriage in accord with the laws of the Cherokee Nation. Since the victim was a Cherokee Nation citizen by adoption, and the defendants were natives by blood, federal law and the Cherokee treaty stipulated that tribal, rather than federal, jurisdiction applied. *But see* United States v. Rogers, 45 U.S. (4 How.) 567 (1846):

> Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the [Indian against Indian] exception in the act of [C]ongress.

Id. at 573; *see* Alberty v. United States, 162 U.S. 499 (1896) (Cherokee treaty agreeing to abolish slavery in 1866 gave some freedmen the rights of Cherokees but did not make all freedmen Indians for purposes of federal jurisdiction.).

and where persons are classified as Native Americans by their race but not by federal law.[205]

The use of tribal definitions of membership would eliminate uncertainty in federal criminal statutes and would allow tribes to continue determining membership for their own tribal law purposes. However, *Duro* implied that tribal membership criteria could not be determined freely. Specifically, *Duro* stated that it might be possible for neighboring tribal governments to enter into reciprocal agreements giving each jurisdiction over the other's members,[206] or to make tribal agreements not to exclude someone who agrees to submit to jurisdiction.[207] The reference to agreements seems to restrict *Santa Clara Pueblo v. Martinez*,[208] which acknowledged the ability of tribes to designate membership criteria. If tribes could freely designate membership criteria, they could declare all residents or Indians to be tribal members, permanent residents, or aliens without agreements.[209] Because that proposition is the same as holding inherent jurisdiction,[210] *Duro* seemed to indicate that tribal membership definitions would be determined by some nontribal criteria. As a result, it remains unclear how tribes would have determined the scope of tribal jurisdiction under *Duro*.

Government participation, membership, or citizenship is generally relevant only to extraterritorial criminal jurisdiction and thus should not be significant in determining tribes' territorial criminal jurisdiction.[211] Confining a tribe's self-government to only some plots of land within the territory or to only some people committing crimes within the territory is administratively difficult, and it defines tribal power in ways that limit, if not annihilate, the prospects for systematic tribal governments.

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205. United States v. Heath, 509 F.2d 16 (9th Cir. 1974). The federal government ended its recognition of the political status of the Klammath Tribe under the Klammath Termination Act; therefore, the Major Crimes Act did not apply to crimes committed by members of a terminated tribe. State law applied. *Id.* at 18-19; *see also* Alberty v. United States, 162 U.S. 499 (1896) (holding that illegitimate child of Choctaw man and slave woman not federally regarded as an Indian).

206. Duro v. Reina, 495 U.S. 676, 697 (1990) ("Our decision here also does not address the ability of neighboring tribal governments that share law enforcement concerns to enter into reciprocal agreements giving each jurisdiction over the other's members.").

207. *Id.* at 689.

208. *Cf.* 436 U.S. 49 (1978).

209. *Id.*

210. For an alternative view of *Duro*'s membership effects, see Eric B. White, Note, *Falling Through the Cracks After* Duro v. Reina: *A Close Look at a Jurisdictional Failure*, 15 U. PUGET SOUND L. REV. 229, 255 (1991).

211. *See supra* note 112.

VI. INDIAN CIVIL RIGHTS AND CITIZENSHIP

The most extraordinary proposition shared by *Oliphant* and *Duro* concerned the protection of citizens from tribal court intrusions into their personal liberty. Tying together theories of government participation, implied divestment, and citizenship, both cases concluded that criminal jurisdiction was such an intrusion on personal liberty that tribes necessarily lost jurisdiction when they surrendered to the overriding sovereignty of the United States. As a result, *Oliphant* and *Duro* concluded that non-Indians and nonmembers could not be tried by tribes that did not provide Bill of Rights protections. According to *Duro*, the criminal jurisdiction retained by tribes was limited to those people who consented to be members and thus consented to the lesser protections of the Indian Civil Rights Act.

The "protection of citizens" concept in *Duro* was based on *Reid v. Covert*,[212] which held that a United States citizen, the wife of a military man, could not be tried overseas by a military court since those courts did not provide the full protections of the Bill of Rights. The superficial relationship between *Reid* and *Duro* includes the partial availability of Bill of Rights protections and consent to be in the military or to be a tribal member. The crucial difference lies in the nature of tribal courts and military tribunals. Unlike military courts, tribes do not derive their power strictly from the federal government.[213] *Talton v. Mayes*[214] explained that powers executed by tribes existed prior to the Constitution were not federal powers arising from the Constitution.[215]

Moreover, "[i]f tribes were implicitly divested of their power to enforce criminal laws over nonmember Indians once those Indians became citizens, the tribes were also implicitly divested of their power to enforce criminal laws over their own members who are now citizens as well."[216] Aside from the impact of any unwritten law, *Duro*'s reasoning also does not explain the importance of Indians' loss of rights before alien Indian tribunals because Indians face the same losses when before courts of their own tribes.[217]

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212. 354 U.S. 1 (1957).

213. United States v. Wheeler, 435 U.S. 313, 328-29 (1978).

214. 163 U.S. 376 (1896).

215. *Id.* at 384.

216. Duro v. Reina, 495 U.S. 676, 707 (1990) (Brennan, J., dissenting).

217. Concerns about alien courts are not new. *Ex parte* Crow Dog, 109 U.S. 556 (1883), held that Indians could not be subjected to alien federal courts because these courts tried Indians "not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception." *Id.* at 571. Congress effectively limited *Crow Dog* by passing the Major Crimes Act shortly after the decision. Ironically, *Oliphant* used the argument to support the opposite proposition that non-Indians needed protection from alien Indian courts.

Duro's theory that an individual's consent to be a tribal member validates differences between the Bill of Rights and the Indian Civil Rights Act is weak in light of the history of federal enactments. Because the Indian Reorganization Act reaffirmed tribal governments and was passed to stop the destruction caused by allotment and because the Indian Civil Rights Act was in part passed to reflect the limited budgets of tribes, the failure of the acts to provide full constitutional protection under the rationale of *Oliphant* and *Duro* would have to be labeled, at best, as Congress's unconscionable compromise; at worst, the Indian Civil Rights Act is unconstitutional.[218]

Congress's affirmation of "inherent" sovereign power over nonmember Indians reaffirmed that the Indian Civil Rights Act was not to be used against tribal governments, but rather as an instrument to protect any person before a tribal court. An obvious explanation for the distinctions between the Indian Civil Rights Act and the Bill of Rights is that tribes are still acknowledged as somewhat distinct from the federal government and the federal constitution. Additionally, the distinctions can be explained as nonfundamental,[219] or as selective incorporation.[220] The differences between the Bill of Rights and the Indian Civil Rights Act include the lack of free counsel for criminal defendants and the lack of a jury for civil trials.[221]

Though the concept of fundamental rights is cloudy, it is clear that *Oliphant* and *Duro* brought attention to what the cases characterized as a problem of reconciling the Indian Civil Rights Act with citizenship. The attention appears to be undue because just as the Bill of Rights applies to both Indians and non-Indians before a federal court, the Indian Civil Rights Act applies to both Indians and non-Indians before a tribal court.[222] In other words, the Indian Civil Rights Act prohibits a tribal government from denying to any "person" within its jurisdiction the equal protection of the laws.[223] Tribal citizens simply hold dual citizenship. Federal citizenship over Indians did not destroy tribal citizenship,[224] thereby making tribal members citizens and subjects of both governments.

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218. For a discussion of consent, see *supra* note 191.

219. *Cf.* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

220. *See* Nell J. Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109 (1992).

221. U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT 5 (1991).

222. Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1988).

223. *See id.*

224. *See, e.g.*, United States v. John, 437 U.S. 634, 653-54 (1978) (A portion of the Choctaw tribe that remained in Mississippi, despite removal, became citizens but did not lose the privileges of Choctaw citizenship.).

Dual citizenship has meant that individual Indians experienced an unusual form of federal citizenship. In *United States v. Celestine*,[225] the Court held that citizenship did not preclude federal jurisdiction over tribes: "[I]t cannot be said to be clear that Congress intended, by the mere grant of citizenship, to renounce entirely its jurisdiction over the individual members of this dependent race."[226] Non-Indians do not hold dual citizenship, and in this sense, they are aliens before a tribe. However, aliens are protected before tribal courts.[227]

The federal government imposed the Indian Civil Rights Act on tribes to ensure individual rights against tribal governments. The Act not only was designed to protect individuals from tribal governments, but also to serve the goal of protecting tribes from undue influence from states. To protect tribes from state interference, the Act eliminated a state's ability to assume civil or criminal jurisdiction over Indian country without prior consent of tribes.[228]

In another effort to block federal or state interference, the federal government deliberately excluded federal review provisions for civil rights violations, other than habeas corpus, because tribal forums were best equipped to determine which remedies were beneficial for tribal survival.[229] Congress had originally suggested extending all constitutional guarantees to tribal governments but then decided to modify the Bill of Rights to fit the "unique political, cultural, and economic needs of tribal governments."[230]

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225. 215 U.S. 278 (1909).

226. *Id.* at 290-91. "The act of May 8, 1906 [34 Stat. at L. 182, chap. 2348], extending to the expiration of the trust period the time when the allottees of the act of 1887 shall be subject to state laws, is worthy of note as suggesting that Congress, in granting full rights of citizenship to Indians, believed that it had been hasty." *Id.* at 291.

227. Despite the protection granted by the Indian Civil Rights Act, non-Indians consistently seek exclusions from tribal authority. For example, in Tracy v. Superior Court, 810 P.2d 1030 (Ariz. 1991), non-Indians tried to apply *Oliphant* to avoid appearing as witnesses in a criminal case held before the Navajo tribal court.

228. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63-64 (1978) (discussing the Act of Aug. 15, 1953, Pub. L. 280, § 7, 67 Stat. 590, which permitted a few states to assume civil and criminal jurisdiction over reservations without tribal consent).

229. *Santa Clara Pueblo*, 436 U.S. at 61-72. Congressional history and the refusal to provide other remedies indicate that Congress wished to avoid "the intrusive effect of federal judicial review upon tribal self-government." *Id.* at 70. Only "minimal" monitoring is provided by the Departments of Justice Interior. When the Indian Reorganization Act was passed, Secretarial approval of tribal constitutions was required, but, as of 1988, the approval provision was diminished to include only about half of the tribal courts. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 221, at 14-22.

230. *Santa Clara Pueblo*, 436 U.S. at 62-63.

Notwithstanding the effort to fit "unique" needs[231] and to protect tribes from the "undue influence" of state or federal authority, the Civil Rights Act's influence was to assimilate tribal courts.[232] Even though a tribe's sovereign powers predate federal powers and do not emanate from federal law, and even though the organization of the Iroquois Confederation influenced the Articles of Confederation, the Subcommittee on Constitutional Rights curiously concluded that a civil rights statute was necessary because tribal judges lacked experience, training, and familiarity with "the traditions and forms of the *American* legal system."[233]

VII. CONCLUSION

The peculiar remnants of past federal policy left tribes with a patchwork of conflicting laws that has served as an impediment to self-government. Allotment left tribes with a checkerboard of Indian country. Courts recommend excluding offenders from *tribal land*, failing to realize that implementation of the remedy in checkerboard Indian country has little enforcement effectiveness over non-Indian landowners. The tribal roll system gave membership, for federal purposes, a life of its own with a federally imposed significance that greatly influences tribes' self-defined uses of membership. Under the Indian Civil Rights Act and the Indian Reorganization Act, the tribal courts are forced to resemble non-Indian courts, turning the current era of self-governance backward into the era of assimilation.[234]

Oliphant v. Suquamish Indian Tribe[235] formulates a particularly potent solution to Indian country problems that suggests suffocation of tribal courts. Both *Duro* and *Oliphant* called on Congress to resolve the inconsistencies in *federal* law by forcing tribal law to change in accordance with

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231. Tribal court budgets are "uniquely" limited. The Civil Rights Commission found that funding was a major problem with tribal justice systems. One "recent tribal court budget was $300,000, while the budget for a similar state circuit court budget with similar responsibilities was over $1 million." U.S. COMM'N ON CIVIL RIGHTS, *supra* note 221, at 38.

232. Commissioner William B. Allen, writing separately from the Civil Rights Commission, found that citizens could not be placed outside the Constitution and that the "United States has no power whatever to make exception, for any purpose whatever." *Id.* at 76-79. Before people in tribes were citizens, actions of the federal government were also constitutionally impermissible. Allen thought that a resolution of the constitutional ambiguities facing individuals might embrace "the choice of full sovereignty or citizenship." *Id.*

233. 113 CONG. REC. H13473 (daily ed. May 23, 1967) (statement of Sen. Ervin) (emphasis added).

234. *Duro* and *Oliphant* come close to comparing federal administrative, military, or legislative courts to tribal courts, despite the nondelegated origin of tribal power and the present and historic distance between the tribes and the U.S. Constitution.

235. 435 U.S. 191 (1978).

delegations of power from the federal government.[236] When Congress did speak, it did not delegate power to tribes or expressly divest tribal power. Instead, Congress reaffirmed the "inherent power of Indian tribes" to exercise criminal jurisdiction over all Indians.

The historical arguments offered in *Oliphant* are ambiguous. Congress never expressly forbade tribal criminal jurisdiction over non-Indians.[237] Given the historic isolation of tribes, the constant policy switches of the federal government, and the Indian Reorganization Act, there was no reason to believe that the government would forever presume that tribes were divested of concurrent jurisdiction upon incorporation into the United States.[238]

Oliphant "proved too much" by saying that non-Indians as federal citizens could not be subjected to a non-Bill-of-Rights court; even tribal members, as federal citizens, were encompassed by its reasoning. The nonmember Indian result in *Duro v. Reina*[239] directly followed and was in a sense directly included in *Oliphant*. As a result, the demise of *Duro* seems to have pinned the validity of *Oliphant* on its criticized historical arguments. In 1981 and 1991, the Commission on Civil Rights recommended a bright-line rule whereby tribes would assume jurisdiction over all persons.[240] Whether or not *Oliphant*'s restriction on tribes' criminal jurisdiction over non-Indians remains, implicit divestment of tribal authority should end. Further, employment of the implicit divestment rationale would reduce tribes to the task of having to imagine whether their actions could or should conceivably be divested. The overbroad and unwieldy reasoning of *Oliphant* surfaced in later cases and produced unpredictable results. For instance, few could have imagined that the Yakima Nation's zoning scheme would be destroyed by the plan in *Brendale v. Confederated Tribes & Bands of the Yakima Nation*,[241] which seemed to advocate spot zoning.

Abstractions, beginning with the discovery doctrine and ending with the implicit divestment doctrine, serve to cover intolerant assumptions. The constant references to informal Indian court systems in *Duro* and in *Oliphant* and the historic waffling of federal officials over whether tribes possessed full or lawless governments confuses validity with tolerance. More important, it clouds the inequitable reality that the federal government pun-

236. Duro v. Reina, 495 U.S. 676, 686, 698 (1990); *Oliphant*, 435 U.S. at 210-12.
237. *Oliphant*, 435 U.S. at 204.
238. *Cf.* The Indian Reorganization Act, 25 U.S.C. § 476 (1988).
239. 495 U.S. 676 (1990).
240. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 221, at 70 n.186.
241. 492 U.S. 408 (1989).

ishes tribes for federally created problems. For example, *Duro* criticized the lack of separation of powers in many tribal governments when the system was recommended to tribes by means of the Bureau of Indian Affairs model constitution.[242]

The Indian Civil Rights Act, according to the sponsor, "should not be considered as the final solution to the many serious constitutional problems confronting the American Indian."[243] We should consider how the problems were created. And, the federal government should consider whether its own system regarding tribes is influenced by "unique customs."

Along the same lines, the language of the courts in this area dehumanizes people. When the Court announces its concern for unwarranted intrusions into "their" personal liberty, the question really should be, who is the Court referring to? The question seems to have been answered by *United States v. Wheeler*: [Tribes] have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation. Tribal laws and procedures are often influenced by tribal custom and can differ greatly from *our* own.[244] To whom does "our" refer, and why the *implication* that tribes have little interest in law and order?

242. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 221, at 36.
243. 113 CONG. REC. H13473 (daily ed. May 23, 1967) (statement of Sen. Ervin).
244. 435 U.S. 313, 331-32 (1978) (emphasis added).